
EXHIBIT 28

▶ Leigh v. Engle
C.A.Ill., 1984.

United States Court of Appeals, Seventh Circuit.
Charles W. LEIGH and Ervin F. Dusek, etc., Plaintiffs-
Appellants,
and George Johnson, et al., Intervening Plaintiffs-
Appellants,
v.
Clyde William ENGLE, et al., Defendants-Appellees.
No. 82-2943, 82-3040.

Argued June 6, 1983.

Decided Jan. 27, 1984.

As Modified On Denial of Rehearing and Rehearing In
Banc March 20, 1984.

Beneficiaries of employee benefit plan brought action against plan administrators and others for alleged violations of fiduciary duties under ERISA. The United States District Court for the Northern District of Illinois, George N. Leighton, J., entered judgment for defendants, and beneficiaries appealed. The Court of Appeals, Cudahy, Circuit Judge, held that: (1) trust administrators did not act solely in interests of plan beneficiaries, where they invested trust assets in companies involved in corporate control contests, administrators themselves were actively involved in the control contests and had substantial interests in them, administrators failed to make intensive and independent investigation of the investment options open to the trust, and trust's investment decision never deviated from best interests of outside investment group; (2) mere fact that trust lost no money in the challenged investment transactions did not preclude ERISA cause of action; (3) corporate director and parent corporation were ERISA plan fiduciaries to extent they selected and retained plan administrator's and had fiduciary duty to oversee administrator's investment decisions; (4) District Court would be required to determine on remand whether delay in distribution of trust assets after its legal termination was reasonable and whether it injured plan beneficiaries; (5) fiduciaries who benefitted from improper use of trust assets had burden of showing which profits were attributable to their own investments apart from their control of the trust assets; and (6) awards of attorney fees and costs to defendants would be reversed.

Vacated and remanded.

West Headnotes

[1] Labor and Employment 231H ⚡ 488

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk488 k. In General. Most Cited Cases

(Formerly 296k49, 255k78.1(7) Master and Servant)

Mere fact that ERISA profit-sharing trust lost no money in challenged investment transactions but, in fact, received extraordinary return on the investment, did not preclude cause of action against trustees and other defendants for breach of fiduciary duty in improperly risking trust assets at least in part to enhance other defendants' control position with respect to corporations in which the investments were made. Employee Retirement Income Security Act of 1974, § 409(a), as amended, 29 U.S.C.A. § 1109(a).

[2] Federal Courts 170B ⚡ 754.1

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)1 In General

170Bk754 Review Dependent on Whether

Questions Are of Law or of Fact

170Bk754.1 k. In General. Most Cited

Cases

(Formerly 170Bk754)

Though district court's findings of fact must be accepted unless they are found to be clearly erroneous, where findings of fact are actually mixed findings of fact and law, review is consequently less deferential than it might otherwise be. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

[3] Labor and Employment 231H ⚡ 476

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk476 k. Good Faith in General. Most

Cited Cases

(Formerly 296k49, 255k78.1(7) Master and Servant)
Good faith is not a defense to an ERISA fiduciary's breach of duty of loyalty. Employee Retirement Income Security Act of 1974, §§ 404(a), 406, as amended, 29 U.S.C.A. §§ 1104(a), 1106.

[4] Labor and Employment 231H ⚡656

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk652 Evidence

231Hk656 k. Weight and Sufficiency.

Most Cited Cases

(Formerly 296k86, 255k78.1(7) Master and Servant)
Evidence established that ERISA profit-sharing plan administrators did not act solely in interests of plan beneficiaries where they invested plan assets in companies involved in corporate control contests, administrators themselves were actively engaged in the control contests and had substantial interests in them, administrators failed to make intensive and independent investigation of investment options open to the plan, and investment decisions never deviated from best interests of outside investment group. Employee Retirement Income Security Act of 1974, §§ 404, 404(a)(1)(B), 406, as amended, 29 U.S.C.A. §§ 1104, 1104(a)(1)(B), 1106.

[5] Labor and Employment 231H ⚡493

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk493 k. Prohibited Transactions;

Parties in Interest. Most Cited Cases

(Formerly 296k48, 255k78.1(7) Master and Servant)
Protective prohibited transaction ERISA provisions relating to plan fiduciary standards should be read broadly in light of Congress' concern with welfare of plan beneficiaries, and courts should look carefully at transaction to decide whether plan assets were used by or for the benefit of a party in interest or whether fiduciary dealt with plan assets in his own interest. Employee Retirement Income Security Act of 1974, §§ 404, 406, 406(a)(1)(D), (b)(1), as amended, 29 U.S.C.A. §§ 1104, 1106, 1106(a)(1)(D), (b)(1).

[6] Labor and Employment 231H ⚡493

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk493 k. Prohibited Transactions;

Parties in Interest. Most Cited Cases

(Formerly 296k48, 255k78.1(7) Master and Servant)
Protective prohibited transaction ERISA provisions relating to fiduciary standards cover actions of trustee who buys shares in target corporation in order to assist either the target's management or the raider in its quest for corporate control or control premium. Employee Retirement Income Security Act of 1974, §§ 404(a)(1), 406(a)(1)(D), (b)(1), as amended, 29 U.S.C.A. §§ 1104(a)(1), 1106(a)(1)(D), (b)(1).

[7] Labor and Employment 231H ⚡493

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk487 Investments and Expenditures

231Hk493 k. Prohibited Transactions;

Parties in Interest. Most Cited Cases

(Formerly 296k48, 255k78.1(7) Master and Servant)
It is not per se impermissible for employee benefit plans to invest in companies involved in control contests or to ally themselves with one side or another in a control contest; central issue is independence of plan fiduciaries who must always be able to act solely for benefit of those whose funds are entrusted to them. Employee Retirement Income Security Act of 1974, §§ 404(a)(1), 406(a)(1)(D), (b)(1), as amended, 29 U.S.C.A. §§ 1104(a)(1), 1106(a)(1)(D), (b)(1).

[8] Labor and Employment 231H ⚡475

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk475 k. Duties in General. Most Cited Cases

(Formerly 296k43.1, 296k43, 255k78.1(7) Master and Servant)
ERISA ties fiduciary responsibilities to a person's actual authority. Employee Retirement Income Security Act of 1974, § 3(21)(A), as amended, 29 U.S.C.A. § 1002(21)(A).

[9] Labor and Employment 231H 463

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk460 Who Are Fiduciaries

231Hk463 k. Officers, Directors and Partners. Most Cited Cases

(Formerly 296k44, 255k78.1(7) Master and Servant)
Corporate director and parent corporation were ERISA plan fiduciaries to extent that they performed fiduciary functions in selecting and retaining plan administrators, and, at least where plan administrators selected were close business associates of director, were required to act with appropriate prudence and reasonableness in overseeing administrators' management plan assets. Employee Retirement Income Security Act of 1974, §§ 3(21)(A), 404(a)(1), 405(a, c), as amended, 29 U.S.C.A. §§ 1002(21)(A), 1104(a)(1), 1105(a, c).

[10] Labor and Employment 231H 486

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk486 k. Conflicts of Interest in General. Most Cited Cases

(Formerly 296k89, 255k78.1(7) Master and Servant)
In determining whether administrators' delays in distributing funds in ERISA-controlled profit sharing fund after corporation's bankruptcy were reasonable and did not injure plan beneficiaries, District Court was required to consider several relevant factors, including administrators' conflicts of interest. Employee Retirement Income Security Act of 1974, §§ 404, 404(a)(1)(B), as amended, 29 U.S.C.A. §§ 1104, 1104(a)(1)(B).

[11] Labor and Employment 231H 659

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk658 Judgment and Relief

231Hk659 k. In General. Most Cited Cases

(Formerly 296k49, 255k78.1(7) Master and Servant)
ERISA provision relating to fiduciary liability for breach of any responsibility, obligation, or duty imposed upon such fiduciary permits recovery of fiduciary's profits only

where there is causal connection between use of plan assets and profits made by the fiduciary on investment of his own assets. Employee Retirement Income Security Act of 1974, §§ 409, 409(a), as amended, 29 U.S.C.A. §§ 1109, 1109(a).

[12] Trusts 390 372(1)

390 Trusts

390VII Establishment and Enforcement of Trust

390VII(C) Actions

390k372 Evidence

390k372(1) k. Presumptions and Burden of Proof. Most Cited Cases

In suit against a trustee who has commingled trust assets with his or her own so that it is difficult to discern which property and profits belong to whom, trustee has burden of showing which property and profits are his; trustee is responsible both for the difficulty and for resolving it.

[13] Labor and Employment 231H 654

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk652 Evidence

231Hk654 k. Presumptions and Burden of Proof. Most Cited Cases

(Formerly 296k89, 255k78.1(7) Master and Servant)
Profit-sharing trust fiduciaries who benefitted from improper use of trust assets had burden of showing which profits were attributable to their own investments apart from their control of the trust assets. Employee Retirement Income Security Act of 1974, § 409(a), as amended, 29 U.S.C.A. § 1109(a).

[14] Labor and Employment 231H 712

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)7 Costs and Attorney Fees

231Hk712 k. Result or Outcome of Litigation. Most Cited Cases

(Formerly 296k143, 255k78.1(8) Master and Servant)
Even where ERISA plaintiff does not prevail on his or her claim, award of attorney fees against plaintiff will rarely be justified. Employee Retirement Income Security Act of

1974, § 502(g)(1), as amended, 29 U.S.C.A. § 1132(g)(1).

[15] Federal Courts 170B 933

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(L) Determination and Disposition of Cause

170Bk932 Reversal or Vacation of Judgment in General

170Bk933 k. Procedure and Effect; Summary Reversal. Most Cited Cases

Given rulings on appeal by profit-sharing trust beneficiaries that trust administrators violated their fiduciary duties to administer the trust solely in interest of the beneficiaries and that other individuals and entities were ERISA fiduciaries, with extent of liability to be determined on remand, attorney fee awards in favor of the administrators and other fiduciaries would be reversed. Employee Retirement Income Security Act of 1974, § 502(g)(1), as amended, 29 U.S.C.A. § 1132(g)(1).

*115 Ware Adams, Chicago, Ill., David P. List, Eugene A. Schoon, James R. Stinson, Sidley & Austin, of counsel, Chicago, Ill., for plaintiffs-appellants. Richard C. Moenning, Chicago, Ill., for intervening plaintiffs-appellants. Morton Denlow, Sachnoff, Weaver & Rubenstein, Ltd., Chicago, Ill., for defendants-appellees. Francis X. Lilly, Deputy Solicitor, Robert N. Eccles, Acting Associate Solicitor, Norman P. Goldberg, Counsel for Fiduciary Litigation, Marc I. Machig, Asst. Counsel, Thomas L. Holzman, Atty., U.S. Dept. of Labor, Washington, D.C., Amicus Curiae.

Before WOOD and CUDAHY, Circuit Judges, and GRANT, Senior District Judge.^{FN*}

^{FN*} Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

CUDAHY, Circuit Judge.

Plaintiffs in this case are beneficiaries of an employee benefit plan who alleged that the plan administrators and others had violated fiduciary duty provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ("ERISA"). The heart of the case is a dispute over how ERISA governs the actions of plan administrators and other fiduciaries with respect to investment activities in contests for corporate

control. The beneficiaries allege that the plan administrators and other defendants violated ERISA when they used plan assets to purchase stocks of companies that were targets of the defendants' investment program. After a bench trial, the district court entered judgment for the defendants. We vacate and remand.

I.

Plaintiffs-appellants are beneficiaries of the Reliable Manufacturing Corporation Employees Profit Sharing Trust ("Reliable Trust"). This action was originally filed by Charles W. Leigh and Ervin F. Dusek; they are beneficiaries of the Reliable Trust and former owners of the Reliable Manufacturing Corporation ("Reliable Manufacturing").*116 Intervening plaintiffs are a class of all other Reliable Trust beneficiaries who have fully vested rights in the trust.

The Reliable Trust was created by Reliable Manufacturing in 1968 as an employees' profit sharing trust; the trust administrators were appointed by the Reliable Manufacturing board of directors. The Reliable Trust is subject to ERISA, and plaintiffs allege that the defendants-appellees violated their fiduciary duties under ERISA in a series of investments the Reliable Trust made in the spring of 1978. Until March 1978, the trust held all of its assets in the form of fixed income money market investments. In late March 1978, the trust invested approximately 30% of its assets in the stock of three companies: Berkeley Bio Medical, Inc. ("Berkeley"), Outdoor Sports Industries, Inc. ("OSI"), and the Hickory Furniture Company ("Hickory"). Both before and after the trust's purchases, other defendants made sizable investments in the same companies. Plaintiffs allege that the investment of approximately 30% of the Reliable Trust's assets in these three companies was done to aid the defendants who hoped either to win control of the companies or to earn substantial "control premiums."

Defendants-appellees are a group of individuals and business entities with close connections to defendant Clyde W. Engle. The complex network of legal and financial relationships among the defendants is central to our disposition of this case, so we must trace them in some detail. Although defendants dispute the characterization, we will on occasion refer to them as the "Engle group."

A.

Clyde Engle stands at the center of the network. He is an Illinois financier and investor with numerous business interests.^{FN1} Since 1976 Engle has been chairman of defendant Libco Corporation. In the spring of 1978, Engle owned 31.5% of Libco shares and through trusts for his children controlled an additional 6.4% of Libco. Supplemental Appendix at 496. He also had some degree of control over an additional 12% of Libco shares owned by the Sierra Capital Group, described below. Clyde Engle's offices are at Suite 1600, 625 North Michigan Avenue, Chicago, Illinois.

FN1. Other business activities of Engle and other defendants are described in several reported federal decisions. See, e.g., *Telvest, Inc. v. Bradshaw*, 697 F.2d 576 (4th Cir.1983); *Issen v. GSC Enterprises, Inc.*, 508 F.Supp. 1278 (N.D.Ill.1981); *Telvest, Inc. v. Wisconsin Real Estate Investment Trust*, 489 F.Supp. 250 (E.D.Wis.1980); *Securities and Exchange Comm'n v. GSC Enterprises, Inc.*, 469 F.Supp. 907 (N.D.Ill.1979). The investments in this case have also spawned other litigation. See, e.g., *Outdoor Sports Industries, Inc. v. Telvest, Inc.*, 88 F.R.D. 44 (N.D.Ill.1980); *Libco Corp. v. Adams*, 100 Ill.App.3d 314, 55 Ill.Dec. 805, 426 N.E.2d 1130 (1981) (defamation suit against plaintiffs' attorney in this case).

Defendant Libco Corporation is a holding company which purchased 100% of the common stock of Reliable Manufacturing from plaintiffs Leigh and Dusek in April 1977.^{FN2} Libco also has offices at Suite 1600, 625 North Michigan Avenue in Chicago. In the spring of 1978, Libco owned 64% of the stock of defendant Telco Marketing Services, Inc. ("Telco"). At that time, Clyde Engle was chairman of the board, chief executive officer and treasurer of Telco. Telco's offices are also at Suite 1600, 625 North Michigan Avenue in Chicago.

FN2. Reliable Manufacturing went into involuntary bankruptcy proceedings in March 1979 and was declared bankrupt on December 6, 1979. The sale of Reliable Manufacturing and the subsequent bankruptcy proceedings are described in *In re Reliable Manufacturing Corp.*, 703 F.2d 996, 998-99 (7th Cir.1983).

Defendant Telvest, Inc. ("Telvest") is a wholly owned subsidiary of Telco formed on June 1, 1978, for investment purposes. Engle was president, treasurer and a

director of Telvest in 1978. Telvest's offices are also located at Suite 1600, 625 North Michigan Avenue in Chicago.

Two other Engle businesses are not parties to this lawsuit, but their investments in Berkeley, OSI and Hickory in 1978 are relevant to the dispute here. First, GSC Enterprises, Inc. ("GSC") is a holding company *117 which owns the Bank of Lincolnwood. In 1978 Engle was chairman of the board and president of GSC, as well as chairman of the board of the bank. GSC's offices are also located at Suite 1600, 625 North Michigan Avenue, Chicago. Second, the Sierra Capital Group ("Sierra") is an Illinois limited partnership engaged in investment activities. The general partner in Sierra is Sierra Associates, another Illinois limited partnership. Clyde Engle is one of two general partners of Sierra Associates. In the spring of 1978, among its other investments, Sierra owned 12% of Libco stock and 19% of GSC stock. Sierra's offices are also at Suite 1600, 625 North Michigan Avenue in Chicago.

Defendant Nathaniel Dardick is an attorney who played key roles in all of the organizations described above. Dardick graduated from the University of Chicago Law School in 1974. He was associated for several years with the Chicago firm of Sachnoff Schragger Jones Weaver & Rubenstein, which did work for Clyde Engle.^{FN3} He then established his own firm with offices at Suite 1600, 625 North Michigan Avenue in Chicago. During 1978 and 1979, Dardick was retained as personal counsel to Clyde Engle. He was also general counsel to Libco, Telco, Telvest, GSC, the Bank of Lincolnwood and Sierra. The record does not show clearly whether Dardick had other clients in 1978 and 1979, but it is clear that Engle and these organizations accounted for most of Dardick's income from his law practice.^{FN4} Dardick is also one of two administrators of the Reliable Trust, and he had direct control over the trust's investments in 1978 and 1979.

FN3. The firm of Sachnoff Weaver & Rubenstein has represented all defendants in this lawsuit at trial and on appeal.

FN4. See Supplemental Appendix at 294-304.

Defendant Ronald Zuckerman was president of Reliable Manufacturing and a member of the Reliable Manufacturing board of directors in 1977 and 1978. However, he received no salary from Reliable

Manufacturing. He was paid only as a member of the Libco board and as an investment consultant to Libco. Zuckerman was also the other administrator of the Reliable Trust. He and Dardick were appointed administrators in September 1977 by the Reliable Manufacturing board of directors, composed of Engle, George Contarsy and Zuckerman himself. (Engle, Contarsy and Zuckerman were also directors of Libco.) Neither Dardick nor Zuckerman received compensation as trust administrators. Zuckerman's offices are also at Suite 1600, 625 North Michigan Avenue in Chicago.

Charles Newbill was originally named as a defendant in the case, but he was never served with the complaint. His role in the case is central, for he was the investment analyst who identified the investment opportunities for Dardick and the Reliable Trust, as well as for Engle, Libco, Telco, Telvest, Sierra and GSC. Newbill first met Engle when both worked at the Harris Bank in Chicago. Newbill was also a general partner in Sierra Associates between 1970 and 1972, and he worked abroad briefly. Newbill went to work for Libco and Engle as an investment consultant in 1976. During 1977 and part of 1978, Libco was Newbill's only paying client.^{FN5} According to Newbill's testimony, he sought financial information from several thousand companies, analyzed their replies to look for undervalued companies, and identified thirty companies which he thought had good investment potential for Libco. During the early months of 1978, Newbill talked with both Engle and Dardick about his research, and he narrowed the list of investment targets. To both Engle and Dardick, he recommended investments in Berkeley Bio Medical, Inc. ("Berkeley"), Hickory Furniture Company ("Hickory"), and Outdoor Sports Industries, Inc. ("OSI"). Newbill's *118 office was also at Suite 1600, 625 North Michigan Avenue in Chicago.

^{FN5}. Newbill submitted a bill to the Reliable Trust for investment advice given in early 1978, but the bill was not prepared until December 1978, several months after this litigation was filed to challenge the investments Newbill recommended. To the extent that Newbill provided investment counseling to the Reliable Trust, he may be considered a fiduciary of the

trust. *See* 29 U.S.C. § 1002(21)(A)(ii).

Defendant National Boulevard Bank is now trustee of the Reliable Trust. The bank became trustee on February 5, 1979, after the challenged investments were made but while the trust still held its shares of OSI and Hickory. The bank is a defendant because all plaintiffs seek an immediate distribution of the assets remaining in the trust.

B.

Plaintiffs' claim here depends upon the relationships between the Reliable Trust's investments in Berkeley, OSI and Hickory, and the activities of other members of the Engle group. Therefore we must examine the activities in considerable detail.

The Engle group's investment and acquisition plans for Berkeley, Hickory and OSI appear in the records of a meeting of the Telco board of directors on April 21, 1978. Supplemental Appendix at 424-29. The meeting was held at Suite 1600, 625 North Michigan Avenue in Chicago. Engle chaired the meeting and Dardick acted as secretary.^{FN6} Engle informed the board that Telco had approximately \$2,000,000 available for investment, and he recommended that Telco invest the money in up to 10% of the outstanding shares of Berkeley, Hickory and OSI. Newbill presented to the board his analysis of the three companies. The minutes of the meeting show that the Telco board learned that members of the group had already begun to establish positions in each of the three companies:

^{FN6}. Zuckerman did not attend the meeting.

As part of these discussions, the Board was also advised of the ownership positions in such companies of certain affiliates of the Company and associates of certain directors of the Company, namely Libco Corporation, GSC Enterprises, Inc., Clyde Wm. Engle, Sierra Capital Group, Ronald K. Zuckerman and the *Reliable Manufacturing Corporation Employees' Profit Sharing Trust*. In particular, it was disclosed that the following persons own shares of Berkeley, Hickory and OSI in the amounts set opposite their respective names as follows:

	Berkeley	Hickory	OSI
Libco Corporation		47,000	
Clyde Wm. Engle	41,670		3,500

GSC Enterprises, Inc.	32,100	4,000	8,000
Ronald K. Zuckerman	1,200		
Sierra Capital Group	21,600		
Reliable Profit- Sharing Trust	15,000	8,000	12,500

Supplemental Appendix at 426 (emphasis supplied). At the time of the April 21st meeting, the various members of the Engle group, including Telco,^{FN7} owned approximately 5.58% of outstanding Berkeley shares, 2.98% of outstanding OSI shares and 4.88% of outstanding Hickory shares. Short Appendix at 29-33. The Telco board adopted a resolution authorizing management to purchase approximately 10% of the outstanding shares of the three companies, but the resolution also put ceiling prices on the purchases. The resolution authorized Telco to consolidate the group's holdings by purchasing shares owned by Sierra, Engle, Libco and GSC. Supplemental Appendix at 427. After the April 21st meeting, virtually all of the group's further purchases of the three stocks were made by Telco or by its subsidiary, Telvest, formed in June 1978.

FN7. Telco began to purchase Berkeley and OSI shares on April 17, 1978.

Thus, during 1978 when the Reliable Trust invested 30% of its assets in Berkeley, OSI and Hickory, other members of the Engle group were purchasing substantial amounts of stock in the three companies both before and

after the trust purchases.^{FN8} Plaintiffs contend that the Engle group purchases and the trust's purchases were part of a concerted investment and acquisition program by Engle and his associates. *119 They allege that the trust's assets were invested to enhance the Engle group's position with respect to control of the three target companies.

FN8. The appellants have not pressed in this court their claims regarding trust investments in other securities, including Bank of Lincolnwood capital notes and Joseph Dixon Crucible Company common stock. Therefore, we have not considered the district court's findings with respect to those investments.

There is no claim here that the Reliable Trust lost any money through the disputed investments. Indeed, the trust profited handsomely from its investments in Berkeley and OSI.^{FN9} Instead, plaintiffs here claim that the trust's assets were put at risk to benefit the Engle group in its program of acquisitions.^{FN10}

FN9. The Reliable Trust's investments in Berkeley, OSI and Hickory may be summarized as follows:

	Number of Shares	Purchase Price	Sale Price	Profits	Return on Investmen t
Berkeley	15,800	\$ 71,580.53	\$118,500. 00	\$ 46,919.47	66%
OSI	12,500	77,736.83	187,500.00	109,763.17	141%
Hickory	12,000	72,433.21	75,000.00	2,566.79	4%
Totals		\$221,750. 57	\$381,000. 00	\$159,249. 43	72%

Profits and return on investment do not include dividends received.

FN10. It is not clear whether the Engle group intended to acquire majority control of Berkeley, OSI or Hickory. The group eventually acquired a majority of Hickory stock, but Hickory

management did not oppose the acquisition. Both Berkeley and OSI management resisted the Engle group's acquisition efforts, and the Engle group succeeded in acquiring only 10.7% and 22% of the two companies respectively. The Reliable Trust made substantial profits on its Berkeley and OSI investments, yet made very little profit on the Hickory investments. See *supra* note 9.

1. *Berkeley investments:* The Engle group's interest in Berkeley began in early 1978, when Berkeley was the target of an unfriendly takeover attempt by Cooper Laboratories, Inc. ("Cooper"). Berkeley president Irving Abramowitz asked Engle to help him defend against the takeover, and Engle purchased more than 60,000 shares of Berkeley stock for himself and GSC in January 1978. By the beginning of March, Sierra and Zuckerman had also purchased Berkeley shares, and the holdings of Engle, GSC, Sierra and Zuckerman amounted to approximately 3.6% of Berkeley shares.

In late February, Engle learned that Abramowitz and Cooper were planning a deal to settle their control contest. Berkeley management planned to give Cooper control of Berkeley's medical equipment subsidiary in return for Cooper's shares of Berkeley. The deal would have kept Abramowitz in control of Berkeley. Engle thought the proposed deal would be disadvantageous to minority shareholders such as himself. Supplemental Appendix at 554-61. Plaintiffs contend that Engle was "locked in" as a minority shareholder under hostile management, and that he sought to escape his position by increasing his control of the company. Engle bought an additional 11,200 shares of Berkeley for himself and GSC between February 27th and March 10th.

Between March 17, 1978, and March 31, 1978, the Reliable Trust bought at Dardick's direction 15,800 shares of Berkeley stock at a total cost of \$71,580.53. Those 15,800 shares represented approximately 10% of the trust's assets at the time and constituted 0.65% of the outstanding Berkeley shares. Adding the trust's shares to those owned by Engle, Zuckerman, GSC and Sierra, the group owned a total of 4.65% of Berkeley at the end of March 1978.

While the Reliable Trust was buying Berkeley shares on his orders, Dardick was helping Engle respond to the proposed deal between Berkeley and Cooper. On March 22, 1978, Engle sent letters on GSC letterhead to the

Berkeley outside directors protesting the proposed deal and arguing that it was contrary to the interests of minority shareholders. He described the transaction as an "improper sweetheart deal." The letters suggested that Engle would take further steps if necessary to protect the interests of minority shareholders. Dardick helped Engle prepare these letters and actually signed Engle's name to them. About two weeks later, Engle, Sierra and GSC *120 filed suit to enjoin consummation of the deal between Berkeley and Cooper.^{FN11} Dardick acted as their attorney in the suit. Thus, at the same time Dardick was investing 10% of the Reliable Trust's assets in Berkeley stock, he and Engle were arguing that Berkeley management was acting contrary to the interests of minority shareholders such as the Reliable Trust.

^{FN11.} Telco, Libco, Engle and Sierra filed a Schedule 13D with the Securities and Exchange Commission in April 1978 regarding their purchases of Berkeley stock. In the list of Berkeley shares held by the reporting persons and their associates, the Reliable Trust shares of Berkeley were included. Their inclusion in the list is by no means conclusive as to whether the trust shares were "used by" the Engle group. However, the inclusion of the Reliable Trust's holdings in the SEC filing is clear evidence that the reporting persons-Engle, Libco, Telco and Sierra-knew of the trust's Berkeley investments.

In April Telco began to purchase Berkeley shares, and by August the Engle group owned 10.72% of Berkeley stock. The litigation initiated by Engle and his associates to enjoin the Berkeley-Cooper deal was settled in August 1978 by having Cooper buy the Berkeley shares controlled by the Engle group for a very profitable price. The Reliable Trust was not a party to the lawsuit, nor were trust funds used in the litigation. However, the trust's shares were included in the settlement.^{FN12}

^{FN12.} Defendants apparently contend that this inclusion of the Reliable Trust shares in the settlement was a generous act to benefit the trust. Brief of Defendants at 37.

2. *OSI investments:* In March 1978, the Reliable Trust and GSC began purchasing OSI stock. By the end of March, the trust owned 12,400 shares and GSC owned 5,100 shares, totalling 1.22% of the outstanding OSI shares. The trust had spent \$77,736.83 for its shares of OSI. At the time of the April 21st Telco board meeting,